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No. 86-42

In The

Supreme Court of the United States

October Term, 1986

G.D. SEARLE & COMPANY,

Petitioner,

v.

SUSAN COHN and WALTER COHN, her husband, and ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W. Cary Edwards
Attorney General of New Jersey
Attorney for Respondent,
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-1527

Michael R. Clancy
Deputy Attorney General
Of Counsel

Harry Haushalter
Deputy Attorney General
•On the Brief and
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

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COUNTERSTATEMENT OF THE CASE

The petitioner, G.D. Searle and Company, is seeking, by writ of *certiorari*, to have this Court review a decision by the Third Circuit holding that the invalidity of the New Jersey tolling statute, *N.J.S.A.* 2A:14-22,* on Commerce Clause grounds is to be prospectively applied. *N.J.S.A.* 2A:14-22 provides for a tolling of certain statutes of limitation against foreign corporations which are not represented in New Jersey for service of process.

Respondents, Susan and Walter Cohn, husband and wife residents of New Jersey, filed a complaint in 1974 with the New Jersey Superior Court, Law Division, against the petitioner, G.D. Searle & Co. The complaint charged Searle with manufacturing an oral contraceptive which was used

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* *N.J.S.A.* 2A:14-22 states that,

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this State after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this State, against whom there is such a cause of action, is not represented in this State by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this State or such corporation or corporate surety is not so represented within this State shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation

by Susan Cohn and which allegedly caused her to suffer a stroke in 1963. By application of Searle, a foreign corporation, the case was removed to the United States District Court for the District of New Jersey because of diversity of citizenship. Thereafter, Searle moved for a dismissal of the suit on the grounds that the complaint was instituted beyond the applicable two-year statute of limitations established by *N.J.S.A.* 2A:14-2. The Cohns countered the dismissal motion, noting that *N.J.S.A.* 2A:14-22 tolled the statute of limitations regarding a cause of action against Searle, a foreign corporation not represented in New Jersey by a person upon whom summons or process may be served. In *Cohn v. G.D. Searle & Co.*, 447 *F. Supp.* 903 (D. N.J. 1979), the district court dismissed the complaint on the basis that it had not been filed within the two-year statute of limitations and held the tolling statute to be inapplicable because it violated the Equal Protection Clause.

Following an appeal by the Cohns, the Third Circuit reversed the district court, finding the tolling provision to be rationally premised and thus consistent with the Equal Protection Clause. That decision was decided in conjunction with the related case of *Hopkins v. Kelsey-Hayes, Inc.*, 628 *F.*2d 801 (3rd Cir. 1980). Searle filed a petition for *certiorari* which this Court granted. In *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404 (1982), this Court sustained the tolling statute under the Equal Protection and Due Process Clauses, finding the preservation of causes of action in the New Jersey courts against foreign, unrepresented corporations by the tolling of the statute of limitations to constitute a valid and rational state concern consistent with the relevant constitutional standards.

This Court also addressed but did not decide a new challenge to the tolling statute under the Commerce Clause.

This Court noted that the Commerce Clause challenge had not been addressed by the lower courts and that, in the context of that challenge, there remained a question as to whether the tolling provision required a foreign corporation to formally register with the New Jersey Secretary of State to do business as the sole means for designating an agent for acceptance of service of process. This Court, therefore, remanded the matter to the Third Circuit to determine whether, assuming the issue had been properly raised below, the Commerce Clause argument had merit. 455 *U.S.* at 414. The Third Circuit remanded this case and *Hopkins v. Kelsey-Hayes, Inc.*, to the district court for consideration of the Commerce Clause issue. *Hopkins v. Kelsey-Hayes, Inc.*, 677 *F.*2d 301 (3rd Cir. 1982).

At the district court level, Searle filed a motion for summary judgment claiming the tolling statute was violative of the Commerce Clause. The Attorney General of New Jersey intervened in defense of the constitutionality of the tolling statute and filed a cross-motion for summary judgment with which the Cohns joined. During the pendency of the district court matter below, the New Jersey Supreme Court addressed the interpretation and validity of the tolling statute in *Coons v. American Honda Motor Company*, 94 *N.J.* 307, 463 *A.*2d 921 (1983) (*Coons I*), in which it determined as follows:

1. The only formal means by which a foreign corporation could become represented and thus designate an agent for the purpose of accepting service of process in New Jersey is by receiving a certificate of authority from the New Jersey Secretary of State to do business in New Jersey under *N.J.S.A.* 14A:13-4.

2. The only means by which a foreign, unrepresented corporation could avoid the tolling of the appli-

cable statute of limitations under *N.J.S.A.* 2A:14-22 is by designating an agent upon whom process can be served in the context of securing a certificate of authority to do business in New Jersey from the New Jersey Secretary of State.

3. The tolling provision, *N.J.S.A.* 2A:14-22, is violative of the Commerce Clause of the United States Constitution because it imposes a "forced licensure" upon an unrepresented, foreign corporation by requiring a certificate of authority from the New Jersey Secretary of State as the only means for such corporation to be represented in New Jersey and thus avoid the tolling effect of the statute.

4. The decision was to be retroactively applied.

Following the decision in *Coons I,* the Supreme Court of New Jersey reconsidered its decision solely on the issue of retroactive application of the invalidity of the statute. In *Coons v. American Honda Motor Co., Inc.*, 96 *N.J.* 419, 476 *A.*2d 763 (1984) (*Coons II*), the court held that the invalidity of *N.J.S.A.* 2A:14-22 on Commerce Clause grounds warranted a prospective application of *Coons I* as of August 3, 1983, the date of that decision. The prospective holding applied to all parties, including the litigants in that case. The Supreme Court of New Jersey, in reaching its decision on the prospectivity issue, applied the equitable balancing test best typified in *Chevron Oil Co. v. Huson,* 404 *U.S.* 97 (1971), and *Lemon v. Kurtzman,* 411 *U.S.* 192 (1973). The court noted that since its decision in *Coons I* was the equivalent of a new rule of law clearly not anticipated and since justifiable reliance was placed on a system that provided for a tolling of statutes of limitation with respect to unrepresented, foreign corporations, the holding of prospectivity was proper and consistent with the relevant precedents of this Court. A petition and cross-petition

for *certiorari* were filed with this Court regarding the decisions in *Coons I* and *Coons II,* which were denied on January 7, 1985. — *U.S.* —, 83 *L.Ed.*2d 800 (1985).

During the pendency of the applications for *certiorari* before this Court in the *Coons* decision, District Judge Dickinson R. Debevoise rendered a decision on December 7, 1984 in this matter with regard to the very issues already decided in *Coons I* and *Coons II* (App. 39A). Judge Debevoise agreed with the holding of *Coons I* that the tolling statute violated the Commerce Clause, but departed from the holding in *Coons II*, determining that the invalidity of the statute should be retroactively applied. This holding resulted in the dismissal of the Cohns' complaint as being filed outside of the two-year statute of limitations. Judge Debevoise determined as a matter of law that he was not bound by the holding in *Coons II* because the question of retroactive-prospective application of an unconstitutional tolling statute was a matter of "federal" rather than "state" law. Judge Debevoise determined that a retroactive holding of the invalidity of the tolling statute was proper on a *per se* basis since the burden of interstate commerce was severe. In addition, the district judge held that a retroactive holding would be appropriate even under a balancing test, finding that the decision in *Coons I* was not a new rule of law and that there were no equitable reasons to permit a prospective holding of the invalidity of the tolling statute.

Following an appeal by the Cohns on the issue of the retroactive application of the invalidity of the tolling statute, the Third Circuit issued an initial opinion on January 7, 1986 (App. 17A) which was modified on March 12, 1986 in response to a motion for rehearing (App. 2A). The Third Circuit reversed the District Court on the retroactive

application of the invalidity of the statute. However, that court did not consider the threshold question as to the invalidity of the tolling statute under Commerce Clause grounds because that issue was not raised before it on appeal (App. 15A).

In reversing the District Court, the Third Circuit applied the three-part test established by this Court in *Chevron Oil v. Huson*, 404 U.S. 97 (1971). It found that the invalidation of the tolling statute was unforeseen, that reasonable reliance on the validity of the statute existed and that Commerce Clause principles would not be retarded by a prospective application of the holding that the tolling statute was invalid.

ARGUMENT

IN ACCORDANCE WITH THE EQUITABLE STANDARDS ESTABLISHED BY THIS COURT, THE THIRD CIRCUIT CORRECTLY DETERMINED TO APPLY THE INVALIDITY OF N.J.S.A. 2A:14-22 ON A PROSPECTIVE BASIS

The applicable common law doctrine initially required the determination of the unconstitutionality of a statute to be retroactive on the basis that the statute was " . . . inoperative as though it had never been passed." *Norton v. Shelton Cty.*, 118 *U.S.* 425 (1886). In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 *U.S.* 371, 374 (1940), this Court recognized the *Norton* doctrine as being overly broad and subject to rejection in the context of public policy concerns regarding the justifiable reliance upon existing law:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have

> consequences which cannot just be ignored. The past cannot always be erased by a new judicial declaration. . . . Questions of rights claimed to have become vested, of status, of prior determination deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous application, demand examination.

Subsequent decisions by this Court have clearly eroded the *Norton* doctrine and have substituted an equitable balancing test to determine whether the invalidity of a statute is to be prospectively or retroactively applied.

That balancing test is best illustrated in *Chevron Oil Co. v. Huson*, 404 *U.S.* 97 (1971), and *Lemon v. Kurtzman*, 411 *U.S.* 192 (1973) (*Lemon II*). Prior to *Chevron, supra*, this Court held in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 *U.S.* 352 (1969), that state law rather than admiralty law, including state statutes of limitation, applied to personal injury actions relating to fixed structures on the Outer Continental Shelf. *Chevron* involved a suit for personal injury suffered by the plaintiff while working on the defendant's drilling rig located on the Outer Continental Shelf. At the time the *Chevron* suit was instituted, the two-year statute of limitations under admiralty law was deemed applicable. The *Chevron* suit was filed within two years of the injury but outside the one-year statute of limitations governing under state law. Thus this Court had to determine the retroactivity of *Rodrigue*. In *Chevron*, this Court noted that in the last few decades it had recognized the doctrine of nonretroactivity outside the criminal area many times in both constitutional and nonconstitutional cases (404 *U.S.* at 106) and translated those holdings into a three-part test to determine whether a retroactive application was warranted:

> In our cases dealing with the nonretroactive question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see *e.g., Hanover Shoe v. United Shoe Machinery Corp., supra,* at 496, 20 *L.Ed.*2d at 1243, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see *e.g., Allen v. State Board of Elections, supra,* at 572, 22 *L.Ed.*2d at 20. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation." *Linkletter v. Walker, supra,* at 629, 14 *L.Ed.*2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra,* at 706, 23 *L.Ed.*2d at 652. [404 *U.S.* at 106-07].

In applying these factors, this Court concluded that the application of the state statute of limitations should not receive retroactive consideration. It noted that *Rodrigue, supra,* was not only a case of first impression but also overruled prior lower court decisions which were binding. It was thus proper for the plaintiff to have relied on the "existing" law at the time suit was instituted. This Court opined that substantial inequitable results would be produced by a retroactive application of *Rodrigue* since the plaintiff had suffered serious injury for which he may be barred from further relief because of a sudden change in the applicable statute of limitations.

In *Lemon v. Kurtzman,* 403 *U.S.* 602 (1971) (*Lemon I*), this Court invalidated a Pennsylvania statutory pro-

gram to reimburse nonpublic sectarian schools for designated secular educational services. In *Lemon II, supra,* this Court determined that its holding in *Lemon I* was to be given prospective effect. Chief Justice Burger, writing for this Court, held that the abandonment of the *Norton* doctrine was compelled by the "recognition that statutory or judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." 411 *U.S.* at 199. He stated that the process of reconciling constitutional concerns reflected in a new rule of law with reliance interests founded upon the old law presents a different issue which must incorporate various considerations, including the relations and conduct of parties, of rights that may have vested, of status, of prior determinations that have been deemed final and public policy. 411 *U.S.* at 199. He noted, however, that "reliance interests must weigh heavily in the shaping" of proper equitable remedies. 411 *U.S.* at 203. Chief Justice Burger further stated that,

> Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of convictions obtained under a prior standard; the problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. . . . But however we state the issue, the fact remains that we are asked to re-examine the District Court's evaluation of the proper means of implementing an equitable decree. [411 *U.S.* at 199].

Thus, as the Third Circuit properly noted, the issue of retroactivity-prospectivity in this matter does not involve a question of constitutional dimension, but relates to es-

sentially equitable considerations which, this Court has emphasized, must be closely scrutinized to reach a fair result.

In applying the three-part test of *Chevron*, the Third Circuit initially noted that the holding of invalidity of the tolling statute under the Commerce Clause was not foreshadowed. The tolling statute, *N.J.S.A.* 2A:14-22, had been on the books since 1949 and a tolling provision had been a fixture of New Jersey law since 1820. *See Lemke v. Bailey*, 41 *N.J.* 295, 298, 196 *A.*2d 523, 525 (1963). The first significant mention of a potential Commerce Clause problem by an appellate court was the decision in *G.D. Searle & Co. v. Cohn*, 455 *U.S.* 404 (1982). Thus, as of 1970, the year in which respondents contemplated this law suit, there was no indication of the invalidation of the tolling statute as to foreign, unrepresented corporations on Commerce Clause grounds.

The second *Chevron* factor involves a consideration of whether a retroactive invalidation of the statute will further or retard the operation of the Commerce Clause principle invoked in *Coons I*. The Third Circuit stated correctly that any inhibiting effect that the tolling statute may have had on foreign corporations contemplating doing business in New Jersey disappears upon the invalidation of the statute, regardless of whether the invalidation is retroactive. The Third Circuit thus properly reasoned that,

> Although it is possible that prospective invalidation will permit maintenance of some suits that would not have been timely filed absent the tolling statute, we do not think that this slight marginal burden, if any, does violence to the Commerce Clause. [App. 11A].

Moreover, in light of the obvious reliance of litigants regarding the tolling statute, the minimal burden, if any, on the Commerce Clause by virtue of a prospective invalidation of the tolling statute does not warrant a retroactive holding.

In applying the final test of *Chevron* concerning reliance, the Third Circuit was sensitive to actual or potential plaintiffs who would be forever barred from litigating claims in court as a result of a retroactive application of the invalidity of the statute. In this regard, it is appropriate to recognize that potential New Jersey plaintiffs may have been justified in relying on the existence of the tolling statute in believing that causes of action against foreign, unrepresented corporations would be preserved in New Jersey. Obviously, a retroactive invalidity of the tolling statute could forever bar such plaintiffs from instituting legal action in New Jersey. For example, there may exist potential plaintiffs who had a cause of action against a foreign, unrepresented corporate defendant which was amenable to long-arm service in New Jersey during the assumed tolling of the statute of limitations.* Such plaintiffs, in strict reliance on the tolling statute and for reasons of convenience, strategy, expense and the like opted to refrain from utilizing long-arm service as the only available means for instituting action in New Jersey within the statute of limitations. Such potential plaintiffs would be seriously prejudiced by a retroactive application of *Coons I* since, but for the tolling statute, timely suit would have been commenced in New Jersey.

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* In *Velmohos v. Maren Engineering Corp.*, 83 N.J. 282, 416 A.2d 372 (1980), the Supreme Court of New Jersey held that the tolling effect was applicable even to foreign, unrepresented corporations that were subject to long-arm service of process.

It is obviously difficult to gauge the number of plaintiffs that may be affected by a retroactive holding and it is also difficult to determine the prejudice to be suffered by those actual or potential plaintiffs who may have relied on the tolling statute. It is clear, however, that the tolling statute must have served a useful purpose in preserving causes of action for New Jersey residents regarding foreign, unrepresented corporate entities, since the New Jersey Legislature would not otherwise have enacted such a provision. The salutary purpose served by such legislation was unequivocally recognized by this Court in *G.D. Searle & Company v. Cohn, supra.* As previously noted, the tolling provision has represented a fundamental facet of New Jersey's jurisprudence for many years. The public had no basis for anticipating a judicial ruling that the tolling statute was invalid and, therefore, had no opportunity to structure its legal strategy accordingly. Thus, in fairness to potential or actual plaintiffs who justifiably relied on the validity of the tolling provision, the holding of unconstitutionality in *Coons I* was properly applied prospectively. Such a holding terminated the tolling of the statutes of limitation applicable to causes of action against foreign, unrepresented corporate defendants on August 3, 1983, the date of the decision in *Coons I,* and triggered the running of the statutes of limitation as of that date.

The petitioner suggests that the Third Circuit's decision in this case is inconsistent with decisions of other circuits and is contrary to precedents of this Court. The petitioner thus maintains that a *per se* rule of retroactivity should be applied whenever a state civil statute is held in violation of the Commerce Clause. Aside from *Chevron* and *Lemon II,* decisions which are clearly precedential

and were correctly applied by the Third Circuit, there is a host of decisions by this Court which have sustained a prospective application of a holding that a civil statute is unconstitutional. *See Los Angeles Dept. of Water and Power v. Manhart,* 435 *U.S.* 702 (1978) (holding that sexual discrimination in the funding of a pension plan was to be prospectively applied in order to avoid disruption of the pension system and in recognition of valid reliance on the existing funding mechanism); *Buckley v. Valeo,* 424 *U.S.* 1 (1976) (a finding that certain facets of the Federal Election Campaign Act were unconstitutional was prospectively applied, thus granting Federal Election Commission's past decisions *de facto* validity based on considerations of reliance and sound public policy); *Cipriano v. City of Houma,* 395 *U.S.* 701 (1969), and *City of Phoenix v. Kolodziejski,* 399 *U.S.* 204 (1970) (sustaining previous municipal financing arrangements later declared unconstitutional on the grounds of equitable principles); *Allen v. State Board of Elections,* 393 *U.S.* 544 (1969) (recognizing the validity of past elections of local officials notwithstanding a finding that such elections were unconstitutional in order to avoid disrupting the local governing system). In each of these decisions relating to civil litigation, the concern of this Court focused on legitimizing past conduct premised on lawful standards. Such a result comports with " . . . one of the first principles of constitutional adjudication—the basic presumption of the constitutional validity of a duly enacted state or federal law." *San Antonio School District v. Rodriquez,* 411 *U.S.* 1, 60 (1973) (Stewart, J., concurring).

The determination by the Third Circuit comports with this Court's standards as articulated in *Chevron* and other precedents, to apply a balancing approach in determin-

ing the prospective-retroactive application of unconstitutional state statutes. In strict adherence to the standards to be considered in determining issues of retroactivity-prospectivity proclaimed by this Court, the Third Circuit balanced the interests of actual or potential plaintiffs, the public policy of preserving causes of action and the consequences of a prospective holding of *Coons I*. The Third Circuit's evaluation was based on reason and fairness in a manner consistent with the rulings of this Court. This fact is further evidenced by the denial of *certiorari* by this Court in *Coons II*, which involved the identical issue presently in question. This Court, having previously declined to review the decision by the Supreme Court of New Jersey in *Coons II*, clearly has not been presented with any additional arguments warranting the grant of *certiorari* in this matter.

The petition for writ of *certiorari* plainly does not present a question of constitutional dimension which would warrant the granting of such extraordinary relief. Therefore, the petition should be denied.

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CONCLUSION

For the above-stated reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondent,
Attorney General of New Jersey

By /s/ HARRY HAUSHALTER
Deputy Attorney General
Member of the Bar of the United
States Supreme Court

DATED: August 6, 1986

MICHAEL R. CLANCY
Deputy Attorney General
Of Counsel

HARRY HAUSHALTER
Deputy Attorney General
On the Brief and
Counsel of Record